IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 129.

GENERAL AMERICAN TANK CAR CORPORATION, a corporation,
Petitioner,

v.

EL DORADO TERMINAL COMPANY, a corporation, *Respondent.*

REPLY BRIEF OF GENERAL AMERICAN TANK CAR CORPORATION, PETITIONER.

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INTRODUCTORY.

Factual Matters.

The brief for respondent does not challenge the accuracy of the factual presentation in petitioner's opening brief. Neither is there any criticism on the score of completeness. The following circumstances are significant:

(1) Respondent does not deny that in the period of 17 months covered by the suit the car mileage earnings of the cars leased to the El Dorado Company were approximately twice the car rental. In other words, the

excess of the car mileage over the car rental was approximately $27.50 per car per month.

(2) Respondent makes no claim that the El Dorado Company has in fact sustained any costs, additional to car rental, in the use of the leased cars.

"Assumptions."

It is suggested in respondent's brief that petitioner has made "assumptions contrary to the stipulated facts" (Brief for respondent, p. 51). Respondent fails to particularize. In point of fact petitioner has made no assumptions in conflict with the facts of record but has scrupulously adhered to such facts.

The Circuit Court, on the other hand, has indulged numerous assumptions which were not only without record support but which were contrary to the record. For example,

(1) The Court erroneously assumed that the car mileage tariffs authorized payment of the car mileage to the El Dorado Company (Opinion, R. 324, 329). When the error was brought to its attention, the Court in express language declared that "we must assume that the applicable tariff is for the compensation of such a lessee-supplier as the El Dorado Company" (Opinion, R. 346). This assumption was contrary to a record stipulation, as we have shown (Petitioner's opening brief, pp. 54-55).

(2) The Court assumed that the El Dorado Company had incurred various elements of cost. The error in these assumptions was pointed out upon pages 60 and 61 of our opening brief. Respondent does not attack the analysis there made.

Respondent has sought to defend the latter of these two erroneous assumptions. It has largely ignored the for-

mer. Plainly it cannot defend or excuse either without overlooking its own contribution to the record and repudiating its record stipulation as to the applicable tariff items. (R. 191.)

A.

THE PRIVATE CAR AS A MEANS OF REBATING OR PREFERENCE.

The petitioner's case is rested upon the principle that while the private car may be used, with the carrier's consent, in interstate commerce, it may not be used in such fashion as to avoid the prohibitions of the statute against rebating or discrimination in any form.

The contention of respondent, on the other hand, is that the user of a private car is entitled to such financial gains and other advantages as he can contrive to secure thereby. Respondent's theory is that the law is not concerned either with the amount of the financial gain to a particular shipper or with the resulting differences in the transportation costs borne by the shippers.

Neither upon principle nor upon authority can any support be found for the views thus advanced on the part of the El Dorado Company. The El Dorado Company bluntly declares that

> "It is of no legal importance that such payment might result in a profit or advantage to respondent" (Brief for respondent, p. 32).

Respondent relies upon an expression from the opinion of this Court in

> *I. C. C.* v. *Diffenbaugh*, 222 U. S. 42, 46, reading
>
> "The law does not attempt to equalize fortune, opportunities or ability."

According to our view respondent has misapprehended what this Court had in mind. The quoted

statement is properly to be viewed in its context and in relation to the facts which were there before the Court. Clearly this Court cannot be understood to have implied that if the shipper succeeds in making a contractual arrangement with a car-line company from which he can derive an indirect remission of transportation charges or a concession in some other form, such is merely his good fortune. In express terms this Court has disclaimed such intent or meaning. Rejecting a contention of similar purport, relating directly to claimed advantages in the use of private cars, this Court said in

The Assigned Car Cases, 274 U. S. 564,

> "Equally unfounded is the contention that, under the guise of regulating carrier instrumentalities, the Commission is seeking to equalize industrial fortune and opportunity. *The object of the rule was not to equalize fortunes, but to prevent an unjust discrimination in the use of transportation facilities and to improve the service.* . . . The fact that Congress has permitted the use of private cars, and that the shippers' acquisition of them proceeds from the motive of self-interest which is recognized as legitimate, cannot prevent the Commission from prohibiting a use of the equipment in a way which it concludes will probably result in unjust discrimination against others and may prove detrimental otherwise to the transportation service. Compare United States v. Illinois Central R. R. Co., 263 U. S. 515, 523, 524; Virginian Ry. Co. v. United States, 272 U. S. 658, 663-665." (pp. 583-4) (Emphasis supplied.)

See also

Ellis v. *I. C. C.*, 237 U. S. 434, 445.

Additional authority is not needed to make it clear that this Court has never given its sanction to private car arrangements resulting either in financial gain or in preference to the user.

B.

THE SHIPPER'S "PROFIT" AS A REBATE.

(1) Propriety of Profit to the El Dorado Company.

The El Dorado Company is under the necessity of contending that, if it can realize a monetary profit out of the excess of the car mileage earnings over the costs incurred in the use of the leased cars, this is a "profit to which it is entitled under the terms of the lease contract" (Brief for respondent, p. 44). It is under the necessity of arguing further that such profit, although derived from the car mileage paid by the carriers to the Car Corporation, has "nothing to do with transportation" (Brief for respondent, p. 43). In order that there may be no question that we correctly characterize the contentions of the El Dorado Company in this behalf, we quote from respondent's brief as follows:

> "This was purely a profit on the car lease contract, to which no carrier was a party, and not a reduction in the freight rates paid." (Brief for respondent, p. 36.)
>
> "If, as petitioner contends, such payment would yield a profit to the El Dorado Company it was a profit resulting from the lease and having nothing to do with transportation." (Brief for respondent, p. 43.)

The position thus taken by the El Dorado Company was sustained by the Circuit Court which expressly declared that "Such profit does not constitute a rebate prohibited by the Act" (Opinion, R. 311).

Thus we have clearly revealed the unwillingness of the El Dorado Company and alike the Circuit Court to recognize the true significance of the profits realized by a shipper-lessee out of an arrangement with a car owning company for the use of privately owned cars.

To state the contention of the El Dorado Company is to answer it. It is true that *in form* the profit arises "out of the lease contract," but *in substance* the profit operates to

reduce the shipper's transportation costs below the published freight rates. The shipper is the financial gainer in the amount by which the car mileage earnings, received from the rail carriers by the car owning company and paid over by the latter to the shipper, are in excess of the shipper's car rental and incidental costs, if any there should be.

We need not extend the discussion. The point has been fully developed in petitioner's opening brief (pp. 20-51). Without conflict it has been ruled in the cases heretofore decided that it is not permitted to a shipper-lessee, by arrangement with a car owning company, to enjoy a monetary profit out of the excess of car mileage earnings over the costs incurred by the shipper in the use of the leased cars. Such profit has been condemned because it constitutes in fact, and therefore in law, a *pro tanto* reduction in the lawful freight charges.

(2) Participation or Knowledge of Rail Carriers.

The El Dorado Company argues that there can be no unlawful rebate without participation by common carriers in the arrangement or understanding. The following is quoted from page 13 of respondent's brief:

> "Of necessity such a rebate or concession could only be made if the carrier directly or indirectly participated in the arrangement or understanding."

The law is plainly to the contrary, as shown by the opinion of the Court in

U. S. v. *Koenig Coal Company*, 270 U. S. 512, 518, 519.

Neither in *I. C. C.* v. *Reichmann*, 145 Fed. 235, nor in *Spencer Kellogg & Sons* v. *U. S.*, 20 Fed. (2d) 459, did it appear that the common carrier participated in or even had knowledge of the arrangement whereby the shipper received a concession. In neither case did the carrier receive less than its tariff rates nor was there failure on the part of the carrier to adhere to the provisions of its tariffs respecting the payment of allowances. In each instance the

arrangement was between the shipper and an intervening third person, viz., a car owning company in the one case and a grain elevator company in the other case. By each decision it was ruled specifically that the shipper may not lawfully receive from the intervening agency, furnishing either a facility or a service of transportation, any payment which operates to reduce the shipper's transportation costs.

Directly pertinent is the following excerpt from the opinion of this Court in *Ellis* v. *I. C. C., supra.*

> "We have stated the nature and object of the investigation, and it is to be observed that not every advantage that may enure to a shipper as the result of the position of his plant, his ownership or his wealth is a preference. Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 46. *But the intervening corporation may be a means by which an owner of property transported indirectly renders the services in question, and in that event its charges are subject to the Commission by § 15.* The supposed unreasonable charge may be used as a device to attain the forbidden end and therefore reasonable latitude should be allowed to see if any such device is used. Interstate Commerce Commission v. Brimson, 154 U. S. 446, 464." (P. 445) (Emphasis supplied.)

It has long been settled that neither participation nor knowledge on the part of the common carrier is necessary in order to constitute the offense of rebating. The law is concerned with results, and not merely with the means of their accomplishment.

(3) Disposition of Car Mileage Payments by Car Corporation.

The El Dorado Company offers this further contention:

> "What the car corporation, *having nothing to do with transportation*, might do with money paid to it for the furnishing of the cars was in no manner covered by the Elkins Act or other provisions of the Interstate Commerce Act." (Brief for respondent, p. 16.) (The emphasis is that of the El Dorado Company.)

This argument has been answered in the immediately preceding discussion. If it were true that the law is not concerned with the disposition of the car mileage earnings received by the Car Corporation from the rail carriers, the private car would be a favored instrument of rebating and preference. The car owning companies could freely bargain with their shipper-lessees as to the division of the car mileage received from the rail carriers, regardless of the resulting profit to the shippers and regardless of diversity in the terms extended to the several shippers. Thus the law would be impotent to reach rebating and discrimination through the use of private cars.

(4) Materiality of Payment of Freight Charges to Carriers at Tariff Rates.

The El Dorado Company contends that since freight charges upon its shipments were paid to the carriers in full at the rates published in the freight tariffs, and since the mileage allowance was paid to the Car Corporation by the carriers at the rate provided in the mileage tariffs, no rebate, concession or discrimination could result (Brief for respondent, p. 16). Thus the respondent again misses the issue. It is not that the common carrier has departed from its tariffs. The question is rather whether the shipper-lessee has obtained a rebate or concession through the payment made to him by the car owning company out of the car mileage received by the latter from the rail carriers.

It appears to be respondent's theory that the prohibitions of the Elkins Act are directed merely against tariff departures on the part of the carriers. In other words, respondent seems to argue, and repeatedly, that there can be no violation of the Elkins Act as long as the carrier receives its full tariff rate (Brief for respondent, pp. 15, 16, 30, 31, 32, 36, 43). Plainly this is not the law. It may be, and often is, the case that a shipper is the beneficiary of an illegal rebate or concession even though the car-

rier can not be charged with any deviation from its tariff rate.

Freight charges were paid in full to the carriers at tariff rates in the *Spencer Kellogg* case and in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323 (R. 49-162). Allowances were also made by the carriers in each of these cases in accordance with tariff provisions. But these circumstances did not save the questioned transactions from the condemnation of the law.

The El Dorado Company's contention that there can be no violation of the Act as long as tariff rates are paid in full in the first instance is completely answered by the following excerpt from the opinion in

Vandalia R. Co. v. *U. S.*, 226 Fed. 713; Cert. den. 239 U. S. 642:

> "The statute evidently aims to prohibit, not only discrimination as between shippers, but departure from the tariff rates, irrespective of its actual discriminatory effect. The history of this legislation demonstrates that both discriminations and rebates have ever been sought to be hidden under the most subtle disguises. Every device that seeks to cover up either a rebate or a discrimination in interstate transportation is denounced by the statute, provided only, as to a rebate, that thereby the property is actually transported at less than the tariff rate. *That the full tariff rate is collected at the time of transportation does not negative the possibility of a rebate in respect thereto. The rebate may be in a lump cash sum in advance* (United States v. Union Stockyards, 226 U. S. 286, 33 Sup. Ct. 83, 57 L. Ed. 226), *or by later or earlier indirect payments* (G. R. & I. Ry. Co. v. United States, 212 Fed. 577, 129 C. C. A. 113)." (p. 716) (Emphasis supplied.)

It is not a matter of consequence, although the respondent apparently entertains a contrary view, that the freight charges on the shipments of the El Dorado Company were generally paid by the consignees rather than by the El

Dorado Company itself (Brief of respondent, p. 31). It is not the law that a rebate can occur only when the payment is made to the party who has actually paid the freight charges.

Northern Central Railway Co. v. *United States*, 241 Fed. 25.

The El Dorado Company has sought, by resort to a variety of reasons, to justify its contention that, as a shipper-lessee of privately owned cars, it is properly entitled to enjoy such profits as may be derived from the excess of the car mileage earnings over expenses incurred in the use of the leased cars. We can find merit in none of the reasons which it has advanced. The position which the El Dorado Company has been compelled to take as to the propriety of "profit" from its lease contract is, we believe, inherently incapable of defense.

C.

THE CAR MILEAGE TARIFFS.

Respondent has hardly put forth a serious effort to defend the Circuit Court's treatment of the car mileage tariffs. It is plain that the Circuit Court mistakenly understood that the car mileage tariffs provided for payment of the car mileage to the El Dorado Company. Its decision was rested largely upon that understanding. We have noted that, in its supplemental opinion, the Circuit Court expressly declared that "we must assume that the applicable tariff is for the compensation of such a lessee-supplier as the El Dorado Company." (Opinion, R. 346.) Such asumption is flatly in conflict with the record.

Respondent concedes, as it must, that

> "The tariff provisions for the payment of mileage allowances for the furnishing of cars were stipulated on the trial and are set out at pages 192 to 197, inclusive, of the record." (Brief for respondent, p. 29.)

Respondent also concedes, and in fact declares, that

> "the carriers properly paid to the car corporation the stated mileage allowances for the use of the tank cars under lease to the El Dorado Company." (Brief for respondent, p. 37.)

These tariff provisions did not authorize payment of the car mileage to the El Dorado Company at any time during the period covered by the suit. During the last two months the tariffs expressly prohibited the payment of car mileage to a shipper-lessee (Petitioner's opening brief, pp. 51, 52).[1]

Respondent is in error in its assertion that the Commission fixed the mileage rate at 1½ cents per mile (Brief for respondent, p. 27). The Commission did not fix the rate, but the fact is plainly immaterial. Neither is it of any consequence that the rate has not been held unreasonable. There has been no issue either as to the existence of the rate or as to its reasonableness. The fact is that, under the tariff rules, the car mileage was at no time payable to the El Dorado Company.

We are content to rest upon the discussion of the car mileage tariffs in the petitioner's opening brief (pp. 51-56).

D.

THE AGENCY THEORY.

Respondent undertakes briefly to defend the "agency theory" but without apparent show of conviction (Brief for respondent, pp. 39-40). The contract sued upon was not one of agency. The complaint does not allege agency relations.

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[1] Respondent is in error in representing that the tariff rule expressly prohibiting payment to a shipper-lessee "became effective after the claims sued upon in this action had matured." (Brief for respondent, p. 39.) The fact is, and it was stipulated, that the amount in controversy includes the car mileage payments collected from the railroads by petitioner "up to the 31st day of May, 1935" (R. 46). This tariff rule, which became effective April 1st, 1935, was therefore in force during two months of the period.

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We have pointed out that the concept of agency cannot aid the case for the El Dorado Company. The law could not be thwarted by the designation of a car owning company as an "agent" through whom a shipper may secure moneys which are not payable to him under the tariffs, thereby accomplishing an indirect remission of the shipper's freight charges (Petitioner's opening brief, pp. 56-58).

E.

THE EL DORADO COMPANY'S COSTS; BURDEN OF PROOF; PLEA IN DEFENSE.

(1) The Record Showing as to Costs.

In our opening brief we undertook to show

(a) That the record reveals no cost or expense, other than car rental, incurred by the El Dorado Company in connection with the use of the cars;

(b) That at no time did the El Dorado Company make any claim or proof of costs other than car rental;

(c) That both parties presented the case in the District Court as well as in the Circuit Court upon the basis that the car rental was the only cost to the El Dorado Company.

(Petitioner's opening brief, pp. 59 *et seq.*)

Even at this time the respondent interposes no real challenge to the foregoing. While we find some observations in respondent's brief respecting *possible* costs and liabilities, it is significant that nowhere is there a categorical statement that the El Dorado Company has paid any additional cost *in fact*. The El Dorado Company does not deny that it made neither claim nor proof of other costs. Theoretical or conjectural costs can claim no standing as realities.

The El Dorado Company impliedly admits that the car mileage earnings exceed its costs, since its announced objective, as heretofore noted, is to recover "the profit to

hich it is entitled under the terms of the lease contract" Brief for respondent, p. 44).

We have cited authorities to the principle that neither arty will be heard, in an appellate court, to question a tate of facts which was accepted without objection in the rial court and upon which the trial court proceeded to de- ide the cause. (Petitioner's opening brief, pp. 59, 60.)

Respondent has not questioned the authority of the cited ases, nor has it presented countervailing authorities.

Upon its own initiative the Circuit Court raised the issue of possible additional costs. This, we respectfully urge, was error. The Circuit Court was not free to formulate a new theory of the case and, in doing so, to assume a state of facts, without record support. Neither is a court of error authorized to reverse a trial court for supposed error which it did not make, and which it could not have made because the point was never presented for ruling. Without conflict the cases so hold. (Petitioner's opening brief, pp. 60-62.)

Respondent is again unable to offer opposing authorities.

(2) Burden of Proof Discharged.

The Car Corporation's burden of proof was fully discharged. The stipulation of facts and the accounts between the parties show the car rental figures, and they also show the car mileage earnings in twice the amount of the rental. It was shown that the expenses of maintenance and repair of the cars were borne by the Car Corporation. This showing, comprehending everything within the command of the Car Corporation, made out a *prima facie* case. Nothing more was needed in the absence of countervailing evidence.

If the El Dorado Company had actually incurred any other costs, the facts were peculiarly within its knowledge. It is foreclosed by its failure to produce the evidence, if any there was, which was presumptively available to it alone. The cases so hold. (Petitioner's opening brief, pp. 62-65)

Respondent cites no case in opposition.

(3) The Plea in Defense.

The answer of the Car Corporation raised a legal defense, predicated upon the Elkins Act. The plea satisfied principle and precedent. The defense was clearly disclosed.[1]

The El Dorado Company at no time questioned the adequacy of the plea, either in the trial court or upon appeal. Upon its own initiative the Circuit Court has criticized the plea, and has done so only in its opinion denying the petition for rehearing. Even if the Circuit Court could properly raise the point, we have shown that the plea was adequate. (Petitioner's opening brief, pp. 66-68.)

* * * * * * * * *

The parties were agreed both in the District Court and in the Circuit Court of Appeals that the case presented a single issue of law, raised by the plea in defense predicated upon the Elkins Act. Counsel for the El Dorado Company repeatedly so stated. (Petitioner's opening brief, p. 67.)

This issue of law alone was properly before the Circuit Court. Respondent has failed to justify the course followed by the Circuit Court in raising issues of its own. Neither upon principle nor upon authority can the rulings of the Circuit Court upon the issues so raised be sustained. Respondent has presented nothing of moment to that end.

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[1] Respondent makes the surprising statement that the matter of cost and profit to the supplier "was injected by petitioner in the Circuit Court of Appeals in support of its argument that the payment by petitioner, according to its agreement, of the mileage allowance received by it from the carriers for the furnishing of tank cars would amount to a rebate or discrimination." (Brief for respondent, p. 34.) This is wholly misleading. This matter of "cost and profit" was necessarily raised by the plea in defense. It was the subject of evidence in the District Court and the issue was fully briefed and argued in that court.

F.

THE CONTROLLING CASES.

We have cited and reviewed the controlling cases (Petitioner's opening brief, pp. 27-51). Respondent offers comment upon these several decisions but in each instance fails to observe the essential holding.

(1) Use of Privately Owned Refrigerator Cars, 201 I. C. C. 323.

Respondent appears to understand that we rely upon the "order" of the Commission in the case here cited (Brief for respondent, p. 21). This is erroneous. We have endeavored to make it clear that our reliance is upon the requirements of law as declared by the Commission in its report.

Respondent states that the Commission entered an order requiring the carriers "to cancel the schedules covering mileage allowances applicable to the use of refrigerator cars." (Brief for respondent; p. 23.) This again reveals a mistaken understanding of the Commission's action. The Commission's order merely required the cancellation of certain newly published rules, which had been suspended during the pendency of the investigation, without prejudice to the publication of amended rules in conformity with the Commission's findings. The Commission's report is of moment here because of its declaration that arrangements may not lawfully be made between car owning companies and shipper-lessees whereby the latter receive car mileage earnings, collected by the car owning companies from the rail carriers, in amounts exceeding the shipper's costs. Such excess payments were condemned as unlawful rebates.

True, the Commission's express findings were necessarily restricted to refrigerator cars, but the Commission properly declared that its conclusions were applicable alike to all other types of private cars. Plainly a practice which was

found to be unlawful in relation to privately owned refrigerator cars must be equally unlawful in relation to privately owned tank cars. The requirements of law do not vary with differences in the types of cars.

As we have shown in our opening brief (pp. 34-35) there is nothing in respondent's contention that the carriers do not "obligate" themselves to furnish tank cars. It appears from the Commission's report in the *Private Refrigerator Car* case that the carriers do not furnish refrigerator cars to meat packers. Yet the Commission condemned the payment of car mileage "to shippers, *including meat packers*" in amounts exceeding their costs (R. 160). Upon occasion the carriers do supply tank cars to shippers for the transportation of vegetable oils (R. 164-168). The point is irrelevant in any event because the statute controls practices in relation to *all* cars, "irrespective of ownership", and therefore precludes the employment of privately owned tank cars as instruments of rebating or discrimination.

(2) I. C. C. v. Reichmann, 145 Fed. 235.

The decision in the *Reichmann* case condemns any arrangement between a car owning company and a shipper whereby the latter receives a part of the car mileage paid by the rail carriers to the car-line company with a resulting indirect remission of freight charges. (Petitioner's opening brief, pp. 38-46.)

Contrary to respondent's statement (brief for respondent, p. 47) it does not appear that these cars had been leased to the rail carriers. They were merely furnished to the carriers upon order. Whether or not a lease were made would be wholly without consequence. The evil at which the decision strikes is the payment to the shipper of car mileage earnings received by the car owning company from the rail carriers with the result that the shipper enjoys a

monetary profit which in effect reduces his freight charges below the lawful tariff rate.[1]

(3) Spencer Kellogg & Sons v. U. S., 20 Fed. (2d) 459.

Attempting to distinguish the holding in the *Spencer Kellogg* case, respondent states that the grain elevator company "was itself an interstate carrier." (Brief for respondent, p. 49.) Such was not the case. The elevator company was not an interstate carrier. True, the elevator company rendered a service of transportation, just as here the Car Corporation furnishes an instrument of transportation. The practice condemned as unlawful was the payment to the shipper, by the intervening agency, of moneys received from the rail carriers, with the result that the shipper's freight charges were reduced below the lawful freight rates. As the Court there pointed out, the Elkins Act is "applicable to any person or corporation who might be in a position to commit an act which would accomplish the forbidden result . . ." (20 Fed. (2d) at p. 461.)

The essential principle of the decision is applicable here (Petitioner's opening brief, pp. 46-50).

[1] Respondent states that in the *Reichmann* case

> "The District Court did not there consider the portion of the Elkins Act relied upon by the car corporation in its defense in this action, and under which a deviation by the carrier from its published tariffs was made a criminal offense." (Brief for respondent, p. 45)

This statement is erroneous in two respects. In the first place, the court in the *Reichmann* case quoted (145 Fed. at pp. 240, 241) and based its decision upon the precise provision relied upon by petitioner. In the second place, that provision is not the second paragraph of the Elkins Act under which a deviation *by the carrier* from its published tariffs is made a criminal offense. The provision upon which petitioner relies is the broad prohibition of the first paragraph of the Act against rebates by "any person, persons, or corporations" whereby property is transported at less than tariff rates.

The decisions upon which the Car Corporation relies are pertinent and, according to our view, entirely conclusive of the major issue. Respondent has failed to distinguish them. On its part respondent has been unable to produce a single authority from which it is possible to draw even an inference in support of its contentions.

CONCLUSION.

The burden of respondent's argument is that it should not be "deprived of the profit to which it is entitled under the terms of the lease contract" (Brief for respondent, p. 44). It declares that "It is of no legal importance that such payment" (i. e., the excess of the car mileage over car rental) "might result in a profit or advantage to respondent" (Brief for respondent, p. 32).

The Circuit Court accepted respondent's contention. It declared that "Such profit does not constitute a rebate prohibited by the Act" (Opinion, R. 311). The ruling is directly hostile to the terms and purpose of the statute.

The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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